United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-2066

To be argued by
HERBERT G. JOHNSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2066

B
P/S

GEORGE HEATH,
Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
FILED
AUG 24 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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Preliminary Statement

Petitioner-appellant George Heath appeals from a memorandum and order (75 C 956) dated March 1, 1976, entered by the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, denying (after a hearing following remand by this Court) appellant's motion made pursuant to Title 28 United States Code, Section 2255, seeking vacatur of his sentence. Petitioner also appeals from a memorandum and order (76 C 516) dated May 20, 1976, entered by Judge Weinstein, dismissing appellant's further motion under 28 U.S.C. § 2255 for vacatur of his sentence and reaffirming, after rehearing, the District Court's denial (as set forth above) of appellant's previous motion under that section. Appellant, who is incarcerated in the Fed-

eral Correctional Institution at Lewisburg, Pennsylvania, is represented on this appeal by appointed counsel, James Bing, Esq.[1]

Statement of Facts

Appellant was convicted (73 Cr. 116) on March 6, 1973, after a jury trial before the Honorable George Rosling, then United States District Judge for the Eastern District of New York, of four counts: (1) assaulting and placing in jeopardy the lives of bank employees by use of a dangerous weapon during the commission of a bank robbery on October 12, 1972 (18 U.S.C. § 2113(a)), (2) forcing a person against his will to accompany appellant and other defendants in the course of said bank robbery (18 U.S.C. § 2113(e)), (3) conspiracy to commit a second bank robbery on January 11, 1973 (18 U.S.C. § 371) and (4) unlawful use of firearms (two revolvers, a shotgun and a pipe bomb) to commit said second bank robbery (18 U.S.C. § 924(c)). Folowing the death of Judge Rosling, appellant was sentenced on May 25, 1973,

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[1] Appellant appeared pro se at a hearing held under docket number 75 C 956 on February 25, 1976, before Judge Weinstein, following remand of the matter by this Court "for further consideration in the light of *United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975)." The remand followed Judge Weinstein's denial (and the appeal therefrom) of appellant's June 6, 1975, motion under 28 U.S.C. § 2255 (75 C 956) to have his sentence vacated. However, under 76 C 516 brought by petitioner following denial of appellant's motion under 75 C 956, Judge Weinstein appointed Mr. Bing to represent appellant. Mr. Bing appeared with appellant at a rehearing held on May 19, 1976, before Judge Weinstein and has represented appellant in these proceedings since. Nothwithstanding such representation and the submission by his counsel of a brief to this Court in the instant appeal, appellant has also submitted (without advising or consulting counsel) a brief of his own. The Government's brief will constitute our response to both appellant's own brief and his counsel's brief in this Court.

by another judge to a term of 10 years on each count on which he was convicted, such terms pursuant to 18 U.S.C. § 4208(a)(2) and all to run concurrently.

On October 17, 1973, this Court reversed appellant's conviction on the two counts pertaining to the first bank robbery (which counts were subsequently dismissed in the District Court) but affirmed the convictions on the remaining two counts with respect to the second robbery. The case was remanded to the District Court, and on December 14, 1973, Judge Weinstein resentenced appellant to sentences of eight and one-half years on the conspiracy count and four years on the firearms count, both pursuant to 18 U.S.C. § 4208(a)(2) and both to run concurrently (Government's Appendix at A-18).

On May 31, 1973, appellant pled guilty in New York State Court, Queens County, to a charge of kidnapping in the second degree with respect to the events arising out of the first bank robbery referred to in the federal indictment. A sentence of 10 years was imposed in that case, with a recommendation by the state court judge that such sentence run concurrently with appellant's federal sentence. On March 12, 1973, pursuant to appellant's subsequent motion for reduction of sentence made in the District Court under Rule 35, Federal Rules of Criminal Procedure, the federal sentence was amended to recommend that such sentence be served at a state correctional facility concurrently with the state sentence.

On June 6, 1975, appellant moved in the District Court (75 C 956) under 28 U.S.C. § 2255 to vacate his sentence on the grounds that (1) appellant's initial hearing before the United States Board of Parole (the "Board") had been tainted by the Board's mistaken impression that appellant was serving a federal sentence of ten years rather than eight and one-half years and (2) that sentence was in violation of the standards set forth by

this Court in *United States* v. *Slutsky*, *supra*, in that at the time he resentenced appellant on December 14, 1973, Judge Weinstein had not been aware of Board criteria under the then-new guidelines for parole and release of offenders, which guidelines had been adopted by the Board and which had become effective and been published on November 19, 1973.[2]

Relying in part on the res judicata effect of the prior decision of the District Court of the Middle District of Pennsylvania, (*see* note 2, *supra*), Judge Weinstein, on June 9, 1975, dismissed appellant's motion under 18 U.S.C. § 2255. On appeal, this Court denied appellant's motion to proceed in forma pauperis and for assignment of counsel, but remanded the matter to the District Court "for further consideration in the light of *United States* v. *Slutsky* . . ." (Government's Appendix at A-3).

Upon such remand, Judge Weinstein held a hearing on February 25, 1976, at which time appellant was produced by the Government and appeared pro se. Appellant argued at length the merits of his contention that Judge Weinstein had not been aware of the effect of the Board's guidelines as the same had been applied by the Board in his case (Government's Appendix at A-20 to A-33).[3]

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[2] Prior to making such motion in the Eastern District of New York, appellant had brought a habeas corpus action in the Middle District of Pennsylvania attacking upon the first ground set forth above the Board's decision denying him parole. Such action was dismissed upon the Government's affirmation that appellant would receive parole review at the one-third point of his sentence, which (upon reconsideration by that court) was established as the one-third point of his 8½-year federal sentence.

[3] At the hearing, argument was also heard upon a separate action brought by appellant in the Eastern District of New York (75 C 2120) again challenging the substance of the Board's actions. Judge Weinstein transferred that action to the Middle District of Pennsylvania in light of the prior litigation in that district upon appellant's claims against the Board. Appellant does not appear to be contesting such transfer in this appeal.

On March 1, 1976, Judge Weinstein again denied the motion to vacate on the grounds that (1) the motion for relief pursuant to *United States* v. *Slutsky* had not been filed within 120 days after resentencing as required under Rule 35 of the Federal Rules of Criminal Procedure and (2) in any event the actions of the Board in appellant's case had been within the court's reasonable expectations at the time of appellant's resentencing on December 14, 1973 (Government's Appendix at A-34 to A-37). On March 9, 1976, appellant filed a notice of appeal of that decision.

On March 8, 1976, appellant filed a further pro se petition in the District Court (76 C 516) under 28 U.S.C. § 2255 challenging the denial of the above mentioned motion for vacatur under 75 C 956. In addition to arguing again that the December 14, 1973, resentencing was "illegal", appellant claimed he had been denied benefit of counsel at the February 25 hearing. Despite his stated view that appellant had clearly waived the right to counsel at the time of said hearing, Judge Weinstein nevertheless ordered James Bing, Esq., appointed as counsel and denominated appellant's new application as a petition for rehearing on the prior action. After consideration of briefs and of arguments of counsel at such rehearing held on May 19, 1976 (Government's Appendix at A-38 to A-45), Judge Weinstein on the following day filed a detailed memorandum and order granting the motion for rehearing and, upon reconsideration, affirming his decision of March 1, 1976 in 75 C 956 (Government's Appendix at A-57). The application under 76 C 516 was denied. Appellant now appeals that order to this Court.

ARGUMENT

Judge Weinstein properly denied appellant's motion to vacate sentence.

Appellant argues in his own brief,[4] as he did when this matter was previously before this Court as a pro se application, that resentencing is required under the doctrine advanced by this Court in *United States* v. *Slutsky*, *supra* (A. Brief at 9-12).[5] The claim is totally without merit.

Judge Weinstein made it abundantly clear throughout the proceedings below that when he resentenced appellant to his present term of incarceration on December 14, 1973, he was aware of the Board's guidelines in such cases, and that appellant's release was to be within the complete discretion of the Board and might occur at a later date than would have been the case had appellant been sentenced under 18 U.S.C. § 4202 (Government's Appendix at A-24 to A-29, A-36, A-54 to A-56).[6] Furthermore,

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[4] As indicated above (*see* note 1, *supra*), we answer herein arguments raised both by appellant in his own brief and by appellant's counsel in his brief. Where necessary for clarity, we will distinguish those briefs by referring to them as "A. Brief" and "A.C. Brief", respectively.

[5] Appellant's counsel makes no such argument in his brief. In fact, he implicitly recognizes that the District Court fulfilled the requirement under *Slutsky* that at the time of imposing sentence under 18 U.S.C. § 4208(a)(2), the District Court Judge have knowledge of the guidelines which will be followed by the Board in later making parole release decisions (A.C. Brief at 6).

[6] Judge Weinstein prefaced his opinions below with statements indicating his difficulty in discerning the basis for this Court's remand predicated upon the *Slutsky* decision (Government's Appendix at A-24 to A-27, A-35 to A-36, A-56), which difficulty the Government respectfully shares. However, Judge Weinstein proceeded to review appellant's arguments on their merits and made all findings for under *Slutsky*.

Judge Weinstein went on to state that he found the subsequent actions of the Board in appellant's case to have been fair and within his "reasonable expectations" at the time of resentencing. *See* Government's Appendix at A-36; *United States* v. *Slutsky*, *supra*, 514 F.2d at 1229.[7] Finally, Judge Weinstein stated that, were appellant's sentence to be imposed at this time, it would be identical to the one now being served by appellant (Government's Appendix at A-57).

Appellant in his own brief also appears to assert that, since the Board's guidelines were promulgated *after* his original sentencing but *before* his resentencing, he was thereby subjected impermissibly to a more severe punishment upon resentencing (A. Brief at 10).[8] A reduction in sentence from ten years to 8 and one half years (later recommended by Judge Weinstein to be served concurrently with a longer state sentence) can hardly be termed an increase in severity. In any case, the parole release criteria which apply to a defendant are those in effect when that defendant is in fact released. Under *Slutsky*, this Court requires only that those criteria be within the reasonable expectations of the trial judge at the time

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[7] It should be noted that at the time of resentencing the District Court (while then explicitly refusing to take any position as to whether appellant's federal sentence might be served concurrently with his pending state sentence in a state institution, although in later proceedings Judge Weinstein did so recommend) was clearly aware of the strong possibility that the state sentence *might* be required by the state court to run consecutively with appellant's federal sentence, thereby exposing appellant to a total period of incarceration far beyond the one-third point of his federal sentence (Government's Appendix at A-18 to A-19).

[8] Such a conclusion is presumably based upon the theory that the Board guidelines somehow provide for more restrictive parole release criteria and consequently result in longer periods of incarceration than had previously been in effect. The statement of general policy accompanying the guidelines belies such intent, however (see A.C. Brief, Exhibit A at 2). Moreover, no evidence has been offered by appellant in support of such a theory.

that the sentence which the defendant actually must serve (i.e., the *final* sentence) is imposed. *United States* v. *Slutsky, supra,* 514 F.2d at 1229.

Appellant's counsel, in his brief, attempts to extend the *Slutsky* doctrine beyond the Court's holding. He contends that, even conceding that the Board's guidelines were known to the sentencing court, the guidelines themselves (and in particular, the Board's policy statement which accompanied the guidelines) were nevertheless misleading to that court in a manner which caused appellant's term of incarceration to be extended beyond Judge Weinstein's reasonable expectations (A.C. Brief at 5-6).

Judge Weinstein, however, clearly dealt with this mutation of the *Slutsky* argument in his detailed opinion of May 20, 1976. He found that the guidelines were not misleading and that appellant's sentence was not thereby indefinite or ambiguous (Government's Appendix at A-55 to A-56). In fact, in promulgating the guidelines, the Board was obviously seeking to bring greater predictability, consistency and fairness to the difficult task of determining the appropriate time for release of inmates. 28 C.F.R. § 2.20(a) (1975); A.C. Brief, Exhibit A at 2; Government's Appendix at A-56; *Grasso* v. *Norton,* 520 F.2d 27, 34 (2d Cir. 1975). Moreover, as we have previously argued (*see* p. 6, *supra*), at the time of resentencing, Judge Weinstein recognized the possibility of a longer period of incarceration under a "4208(a)(2) sentence" then under a "4202 sentence" and clearly intended that the Board's discretion should control in such matters (Government's Appendix at A-36).[9]

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[9] At bottom, we contend, this argument constitutes an attack upon the Board guidelines themselves. However, this Court has previously examined those guidelines and has plainly held that they constitute a valid and lawful exercise of regulatory authority. *Grasso* v. *Norton, supra,* 520 F.2d at 37.

Appellant's counsel further contends that the Board's policy statement accompanying the guidelines falsely led the District Court Judge to believe that those guidelines were only to be a consideration in the Board's deliberations, whereas in fact they were determinative with respect to appellant's eligibility for early release (A.C. Brief at 6).

Examination of the policy statement does not support counsel's theory. Although that statement describes the wide ranges of time to be served under categories of offense and offender characteristics as "'merely guidelines," they nonetheless "indicate the *customary* range of time to be served" (A.C. Brief, Exhibit A at 2) (emphasis added). Furthermore, the stated purpose for the publication of the statement of policy, contained in its introduction, was "to inform the public of the Board's *customary* paroling policy" (*Id.*) (emphasis added).

In any event, Judge Weinstein has stated that he was aware of the Board's practices even before the guidelines were published (Government's Appendix at A-24 to A-25). Despite the fact that the Board apparently follows its guidelines in the great majority of its decisions, there was and is room for individual consideration in all cases, and decisions outside the guidelines appear in a significant number, albeit a minority, of those cases(A.C. Brief at 8). Judge Weinstein plainly intended that the Board's discretion should control and he found no abuse of that discretion in the Board's decision in this case. (Government Appendix at A-32 to A-33, A-36).

Finally, appellant's counsel advances the case of *United States* v. *Hunt*, 413 F.2d 983 (4th Cir. 1969). Appellant's reliance on *Hunt* is entirely misplaced.[10] As

[10] In *Hunt* the trial judge had failed, in accepting a written waiver to a jury trial, to interrogate the defendants in order to be sure they understood that they had a right to a jury trial. Even under such a set of facts the court held that extraordinary circumstances requiring relief had not been presented.

the facts in this case clearly show, Judge Weinstein *was* fully aware of the Board's parole practices. He did *not* resentence appellant on the basis of any misunderstanding or misconception of the Board's policies. Contrary to the claims of appellant, there was here no lack of knowledge on the part of Judge Weinstein. Notwithstanding appellant's efforts by means of protracted post-conviction litigation, this case presents no circumstances of any kind, let alone "extraordinary" ones, which justify relief under 28 U.S.C. § 2255.

CONCUSION

The orders of the District Court dated March 1, 1976, and May 20, 1976, respectively, should be affirmed.

Dated: Brooklyn, New York
August 20, 1976

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 614—353—235

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 23rd day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

James Bing, Esq.
1 Chase Manhattan Plaza
New York, N. Y. 10005

Evelyn Cohen

Sworn to before me this
23rd day of Aug., 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4615278
Qualified in Queens County
Term Expires March 30, 19.....7